

**Pham (Migration) [2020] AATA 2786 (4 June 2020)**

**DECISION RECORD**

**DIVISION:** Migration & Refugee Division

**APPLICANT:** Mrs Thi Kieu Tien Pham

**CASE NUMBER:** 1923856

**DIBP REFERENCE(S):** CLF2012/185646 CLF2015/60745  
CLF2015/73714

**MEMBER:** Linda Holub

**DATE:** 4 June 2020

**PLACE OF DECISION:** Sydney

**DECISION:** The Tribunal affirms the decision not to grant the applicant a Partner (Residence) (Class BS) visa.

Statement made on 04 June 2020 at 7:45am

**CATCHWORDS**

*MIGRATION – Partner (Residence) (Class BS) visa – not a genuine spousal relationship – Federal Circuit Court remittal – evidence provided – joint finances, household, witnesses statements – credibility concerns – not a genuine relationship – decision under review affirmed*

**LEGISLATION**

*Migration Act 1958, ss 5CB, 5F, 65, 375A*

*Migration Regulations 1994, Schedule 2, r 1.15A(3)(c)(i)-(ii), cls 820.211(2) and 820.221*

**CASES**

*Singh v Minister for Home Affairs [2019] FCAFC 3*

## STATEMENT OF DECISION AND REASONS

### APPLICATION FOR REVIEW

- 1) This is an application for review of a decision made by a delegate of the Minister for Immigration on 16 October 2015 to refuse to grant the visa applicant a Partner (Residence) (Class BS) Subclass 801 visa under s.65 of the *Migration Act 1958* (the Act).
- 2) The visa applicant applied for the visa on 6 September 2012 based on her relationship with the sponsor. At that time, Class UK contained only one subclass: Subclass 820 (Partner). The criteria for the grant of this visa are set out in Part 820 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria.
- 3) The delegate refused to grant the visa on the basis that the visa applicant did not satisfy 801.221. This is because he was not satisfied the applicant was in a genuine and continuing relationship with the sponsor as is required in sections 5F(2)(c) and 5CB(2)(b) of the Act.
- 4) The matter is before the Tribunal for a second time following a decision by the Federal Circuit Court (FCC) to set aside the previous Tribunal's decision (differently constituted) of 20 June 2017. The Court's decision of 19 August 2019 states that:

1. "The first respondent concedes that the application must be allowed on the basis that the decision of the second respondent dated 20 June 2017 is affected by jurisdictional error. The second respondent failed to give proper, genuine and realistic consideration to corroborative evidence directly relevant to reg 1.15A(3)(c)(i)-(ii) of the Migration Regulations 1994 (Cth).

2. Relevantly, in support of the applicant's combined application for Partner (Temporary) Subclass 820 and Partner (Residence) Subclass 801 visas, the applicant provided statutory declarations from four witnesses, a letter from a fifth witness and a sixth witness gave oral evidence at the hearing before the second respondent. Although the second respondent found that "*many of the persons making the statements have an interest in a positive migration outcome for Ms Pham*" ([39]), three of the witnesses were objectively independent. The second respondent did not identify why it came to the conclusion that the witnesses had "*an interest in a positive migration outcome*" ([39]). The second respondent erred in making broad and unexplained findings in relation the corroborative witnesses without giving proper, genuine and realistic consideration to the evidence: *Singh v Minister for Home Affairs* [2019] FCAFC 3 at [34].

- 5) For the following reasons, the Tribunal has concluded that decision under review should be affirmed.

### 3. Tribunal hearing

- 6) The visa applicant appeared before the Tribunal on 17 March 2020 to give evidence and present arguments. The Tribunal also received oral evidence from her sponsor, family members and friends of the couple. The Tribunal hearing was conducted with the assistance of an interpreter in the Vietnamese and English languages.

- 7) The applicant was represented in relation to the review by her registered migration agent who attended the Tribunal hearing.
- 8) At the hearing the Tribunal explained the decision of the Federal Circuit Court to remit the previous decision back to the Tribunal and explained that although the Court had found that a specific jurisdictional error had occurred, once remitted, the Tribunal is required to reconsider the entire matter.

#### **4. Background**

- 9) The visa applicant is a citizen of Vietnam and is 35 years of age. She first entered Australia in 2010 holding a Subclass 573 (Higher Education sector) visa. At hearing, the applicant stated that she came to Australia to study. She was enrolled at Curtin University at the Sydney campus. She stated that she studied Finance. On 6 September 2012 she lodged a Partner (Residence) (Class BS) (Subclass 801) visa application on the basis of being in a relationship with her sponsor. She was granted a Partner (Temporary) subclass 820 visa on 20 December 2012.
- 10) The applicant's sponsor is 40 years of age. He was born in the Vietnam and obtained Australian citizenship by grant in December 2001. The sponsor has been in two previous relationships. The visa applicant is the second person he has sponsored for a partner visa. He has a 14 years old daughter from a previous relationship.

#### **5. RELEVANT LAW AND ISSUES TO DETERMINE**

- 11) To be granted the temporary visa, the visa applicant had to meet the criteria in Part 820 of the Schedule 2 of the Migration Regulations 1994. The delegate for that application found that she / he satisfied clause 820.211(2) and 820.221 because she was sponsor's spouse when she applied for the visa and at the time of the decision to grant the visa.
- 12) To be granted the residence visa, the visa applicant must meet the criteria in Part 801 of Schedule 2. To satisfy clause 801.221(2) she must continue to be the sponsor's spouse at the time of decision on the visa application. The delegate found that was not the case and refused to grant the visa for that reason.

#### **CONSIDERATION OF CLAIMS AND EVIDENCE**

- 13) The issue in the present case is whether the visa applicant and sponsor are in a genuine relationship.

#### **Whether the parties are in a spouse or de facto relationship**

- 14) Relevantly to this matter, cl.801.221(2)(c) requires that at the time of this decision, the applicant is the spouse or de facto partner of the sponsoring partner, who must be an Australian citizen or Australian permanent resident or an eligible New Zealand citizen who was specified in the Subclass 820 visa application as the spouse or de facto partner of the applicant. In the present case the applicant claims to be the wife of the sponsor who is an Australian citizen and was identified in the related Subclass 820 visa application.
- 15) On the evidence before it, the Tribunal is satisfied that the sponsor is the 'sponsoring partner' of the applicant. The parties provided a copy of their marriage certificate and the Tribunal is satisfied they are validly marriage.

## Consideration of all aspects of the parties' relationship

### 6. Nature of the person's commitment to each other

- 16) The Tribunal has considered the nature of persons' commitment to each other including duration of the relationship, the length of time they have lived together, degree of companionship and emotional support they draw from each other and whether they see the relationship as long-term.
- 17) In written evidence provided by the couple in support of the application they claim that they met at the wedding of the visa applicant's uncle and sponsor's mother in Vietnam in 2009. The couple had little contact with each other until the visa applicant moved to Australia to study in March 2010 and lived with the sponsor, his mother, sponsor's sister and daughter. In July 2010 the visa applicant's uncle moved to Australia with his children and the extended/blended family lived together.
- 18) The couple claim that on Valentine's Day 2011 the sponsor bought the applicant a rose and declared his love for her and that he wanted to be her boyfriend. She did not respond immediately because she was not ready to do so and wanted to seek her family's opinion about the relationship. After some consideration she accepted and they subsequently became engaged on New Year's Eve 2011. Both parties stated at hearing that the sponsor's proposal was quite sudden. The applicant stated they had not known each other very long.
- 19) The couple married in a civil ceremony on 19 May 2012 in Bankstown, Sydney. A copy of their marriage certificate was provided to the Tribunal. The Tribunal was also provided with a receipt for a wedding party from Liberty Palace Wedding Receptions dated the same day as the couple married. Photographs taken of their wedding were also submitted. The Tribunal accepts that the photographs show the couple attending their wedding ceremony.
- 20) The applicant provided a Statutory Declaration dated 14 March 2015 in which she states the couple's relationship began in 2012 and they have been living together for nearly three years. It states they love and care for each other and have a lot of things in common but does not explain what. It states that they always discuss the future and that they are planning for the sponsor to look for a suitable job and that they will work hard to save money and buy their own place. They would like two children.
- 21) The couple provided Statutory Declarations dated 13 March 2020. They are written in broadly similar terms. They repeat previous evidence regarding the initiation and development of the relationship, the time they spent together in Vietnam in 2012 and describes their wedding arrangements. They also make reference to when the couple first became sexually intimate.
- 22) During the course of the hearing, the Tribunal discussed the emotional support and companionship the couple provide each other. In response, the applicant referred to the sponsor's short temper. She stated that when he gets angry, she lets him calm down. He allows her to do the same and gives her some money to go shopping. She also referred to them hugging each other and giving the person who is upset, some space. The sponsor initially had trouble understanding the question. When the question was re-worded, he stated that he takes the applicant fishing when she is upset.
- 23) When asked what sort of issues might upset the applicant, the sponsor stated that if she is overworked or tired, she might get upset. When asked about tensions that arise in the relationship in their relationship, the sponsor stated that he likes everything to be tidy

around the house, but the applicant is not organised. He stated that if tension arises, they go out and he tries to talk to the applicant to calm her down. When asked if he ever gets upset the sponsor stated that the applicant supported him when his brother passed away.

- 24) The visa applicant stated that the tension that arises in the relationship relates to financial matters and employment. The visa applicant said that because her visa status is not yet settled it affects her employment. She stated that the visa application process had cost a lot of money and because the sponsor has some health issues, he only works part-time. The visa applicant also referred to encouraging the sponsor to look for employment and that she tries not to be the only one who goes to work. The applicant stated that all these issues are related to each other but there were no other issues that caused tension within their relationship.
- 25) Later in the hearing the Tribunal put its concerns to the applicant that she and sponsor provided different accounts as to the issues that cause tension in their relationship. The applicant responded that when she was asked about the about stress/ tension in the family she gave her answers. The Tribunal explained that those issues do not appear to be the same as those the sponsor believes cause tension between them as a couple. She responded that their financial situation, work and employment are the basic things that cause tension in their relationship, but her husband thinks the tension is caused by her not organised because he is very organised. The Tribunal agreed to take post-hearing submissions on the different responses provided by the couple.
- 26) In a Statutory Declaration dated 31 March 2020, the applicant stated that the things that worry are their finances are the main tension of the relationship. She has been and is the main income earner for a long time and so she carries the burden of bringing income to the family. She wrote that a source of tension was that the sponsor did not care sufficiently about their financial problems but cared more about the state of the house. She further explains that when she tries to talk to the sponsor about financial matters, he would comfort her that everything would be fine and to trust him. She felt that he did not understand or was not aware of the money problems but cared more about tidying the house or caring for the garden.
- 27) The applicant also declared that she found out after the hearing that the sponsor does privately care about their finances, but he does not talk with her about his worries because he did not want her to worry or make her stressed. She further declared that the sponsor did not talk about their financial problems at the hearing because he did not want her to know that he worries about money and so as not to make her stressed about money.
- 28) The applicant stated that the sponsor had traditional values and he feels a duty to be the main income earner but that she has been the main earner and she manages the financial affairs of the relationship. The sponsor has not talked to the applicant about how he feels previously but she now understands that he is not proud that she is earning the money in the relationship. Consequently, he does not like to talk about it in front of family and friends and that is another reason he did not talk about it at the hearing.
- 29) The sponsor also provided a Statutory Declaration following the hearing dated 31 March 2020. In it he declared that he is aware and privately worried about their financial problems, but he did not raise this at the Tribunal hearing because he did not want the applicant to know that he is worried about it or to make her more worried about money. He stated that at home they never talk about their financial problems and he tries his best to avoid talking about them or showing her that he is stressed because he does not

want her to worry. He said that he always tells her it will be all right and there did not need to worry about money because he wants to be strong for her and keep her calm.

- 30) The sponsor also declared that in Vietnamese culture the man is supposed to be the main income earner in the family. He is not the main income earner in the relationship, and they rely on the applicant's income for the living expenses. He is not proud of this and he feels hurt and embarrassed that he cannot take of her as the man in the relationship. As a result, he does not like to talk about these "unhappy" things in front of his family and he does not want to be worried that these financial issues will cause problems in his marriage with the applicant.
- 31) The applicant's migration representative repeated these explanations in his covering letter of the same date.
- 32) The Tribunal referred to the applicant's pre-hearing submission in which she stated that she and the sponsor have always wanted to have children and that she had some pregnancy tests in 2013.
- 33) At hearing the applicant was asked about the results of those tests. She responded that she was told that she is healthy enough to have children and was told to relax and she would get pregnant. The applicant stated that she has not fallen pregnant. The Tribunal asked whether she had taken any other steps or sought any further advice. She responded that she had not done anything further because she has been busy. The applicant stated that if she was told that she needed to use IVF should become more stressed because there would be additional costs. The applicant acknowledged that she had not actively monitored her fertility and repeated that the doctor advised her to let it happen naturally.
- 34) The Tribunal asked the sponsor about their plans to have children. He stated that he would like children but that if the applicant does not obtain a visa it would be a problem. The sponsor stated they have tried to have a child, but he is worried because of her visa status. He responded they have tried but she has not conceived. When asked if they use contraception, the sponsor responded that that the applicant sometimes uses contraception. He stated that when he worries about his situation, he asks her to use contraception.
- 35) The Tribunal put its concern to the applicant regarding the responses at hearing regarding their plans to have children. In particular, the sponsor's evidence that they use contraception which was not consistent with the applicant's evidence that they have been trying unsuccessfully and that she has been told that she should not worry about falling pregnant. The visa applicant responded that after the wedding they kind of used contraception but then after a few years she did not think about that anymore and she just let it go.
- 36) The Tribunal accepts the couple married in May 2012 based on the marriage certificate provided. The Tribunal is prepared to accept that the couple have lived in the same household since the applicant came to Australia. However, the other evidence provided by the couple raised concerns for the Tribunal that they have a mutual commitment to each other.
- 37) The Tribunal is prepared to accept that the sponsor has been raised with traditional Vietnamese cultural values and that he is not proud of the fact he is not the main income earner and feels hurt and embarrassed about this. The Tribunal is also prepared to accept that the sponsor is reluctant to discuss his worries because he did not want the applicant worry or make her stressed. However, the Tribunal did not find convincing the

applicant's claims that she only found out after the hearing that the sponsor cares about their finances. The Tribunal has had regard to the fact that the couple have been married since 2012 and even though there may be cultural sensitivities, it appears far-fetched that the concerns of the parties have not surfaced in discussions between them prior to the hearing.

- 38) In relation to the applicant's claim that the sponsor did not talk about their financial problems at the hearing because he did not want her to know that he worries about money and so as not to make her stressed about money the Tribunal is of the view that this claim is a contrivance. It would be reasonable to expect that given the previous Tribunal decision to affirm the Department's refusal both the applicant and her sponsor would provide responses at hearing that were open, forthcoming and honest, in order to ensure a positive outcome.
- 39) The Tribunal has considered the couple's claimed desire to have children as an indication of whether they see their relationship as long-term, particularly in the light of written claims that the couple wished to have two children. However, the Tribunal had concerns with some of the oral evidence provided regarding their intentions to have children. Initially the visa applicant stated that she has not sought any further medical advice as to why she has not fallen pregnant since 2012 because she has been very busy. She also claimed that her doctor advised her to relax and allow it to happen naturally. At one stage the applicant also claimed that utilising IVF would make her more stressed and it would be expensive. While these statements are not contradictory, they raised concerns for the Tribunal. If the couple were genuinely interested in having children, the claim that the applicant was too busy to ascertain why she had not fallen pregnant appears inconsistent with that desire. While the Tribunal is prepared to accept that using IVF would make the applicant more stressed the applicant's reasons for raising this are unclear as no evidence was provided that there are any fertility concerns. Indeed, the applicant stated that she has not pursued any further medical advice regarding the couple's ability to have children.
- 40) The Tribunal noted that the sponsor's explanation as to why they have not had children differed from those put forward by the applicant and this raised further concerns.
- 41) In her 31 March 2020 Statutory Declaration, the visa applicant stated that she listened to the audio recording of the hearing and that the interpreter said that she stopped using contraception after a "few years". She stated that she did not say this. She stated that she can confirm that she replied that after they wanted a baby, they stopped it. She claims that her answer was not translated correctly by the interpreter.
- 42) The applicant also declared that they only used contraception after the wedding until about late 2013 when they decided to have a baby. She said they decided to stop using contraception at that time because initially they wanted their child to be born in 2014 during the year of the horse in the Chinese zodiac. However, they are still trying for a baby and do not mind what year the baby is born. She stated that the sponsor misunderstood the question at the hearing and thought he was being asked if he had ever used contraception in their marriage. He did not mean that they were still using contraception after they started trying or that they are still using contraception.
- 43) The applicant further declared that the sponsor has been worrying about raising a child without a mother in Australia since they got married in 2012 which is why they started using contraception. Although he is still worried about it, he has accepted that they just take a risk if they ever want to have children.

- 44) The covering letter provided by the applicant's migration representative on 31 March 2020 repeats the explanations provided by the applicant and the sponsor and surmises that the inconsistent answers at hearing were the result of an unfortunate misunderstanding by the sponsor of the question put to him.
- 45) The Tribunal is of the view that that the applicant's written response to concerns raised at hearing raises questions regarding the applicant's credit. In her response she claimed that the couple wanted their child to be born in 2014. The Tribunal has considered this explanation in the light of written evidence the applicant had submitted in the context of the previous Tribunal review, in particular, a medical certificate dated 7 December 2016. That certificate states that the applicant
7. "attended Medicare Centre since 13-9-2013. This patient is registered in our medical record as married. She has attended our surgery on 19-8-2014 to have tests in preparation for pregnancy. She had another consultation on 14-9-2014 regarding antenatal planning"<sup>1</sup>.
- 46) This evidence raises significant doubts about the applicant's claims regarding the couple's plans for a potential birth in 2014. Any attempt or intent to have a child in the 2014 calendar year would have required the couple commence necessary preparations well in advance of August 2014. Given the credibility concerns, the Tribunal did not accept the remaining claims made by the couple in relation to the conflicting evidence regarding their desire to have children, if and when they used contraception and other related factors.
- 47) The Tribunal is prepared to accept the couple met at a wedding and accepts they have been married since 2012. However, the evidence regarding the degree of companionship and emotional support they draw from each other was not strong. The Tribunal attempted to gain further insights into their relationship by discussing the areas of tension that arise between them. The Tribunal found it troubling that the couple gave very different responses regarding this issue. As already described, the Tribunal did not accept the explanations provided as to why they provided such different perspectives on what causes tension in their relationship. The discussion and subsequent post-hearing submissions regarding the couple's interest in and attempts to have children gave rise to credibility concerns as outlined above.
- 48) Therefore, overall, the Tribunal is not satisfied that the evidence put forward supports a finding that the couple have a genuine commitment to a long-term relationship together.

## 8. Financial aspects

- 49) The Tribunal has considered the financial aspects of the relationship including joint ownership of real estate of major assets, joint liabilities, the extent of pooling of financial resources, any legal obligations owed to the other party, and the basis of any sharing of day-to-day household expenses.
- 50) The applicant provided a Statutory Declaration dated 14 March 2015 in which she states she previously worked in housekeeping and referred to her employers. She wrote that her wage is deposited into their joint bank account. She stated that the sponsor worked as a process worker but left after a year because he had problem with his back and arm and that at the time of writing he was looking for suitable work. She stated that he does not receive any Centrelink benefits and is financially reliant upon her. The applicant stated they use and share money together and that they have an internet saving account which they intend to use as a deposit for their future property.

<sup>1</sup> AAT file 1514638, folio 104.



- 51) In the applicant's 13 March 2020 Statutory Declaration to the Tribunal, she wrote she and the sponsor shared household expenses with her mother-in-law and uncle. She stated that her uncle is responsible for paying the rent, her mother-in-law is responsible for buying groceries and food and that she and the sponsor are responsible for paying the utility bills such as gas, water and electricity. The Statutory Declaration explains that the couple opened a joint Smart Access bank account in June 2012 not long after they married. It states that they use the account to pay the utility bills as well as their own everyday expenses such as eating out, fuel and other expenses such as car insurance. They also have a net Saver bank account with the Commonwealth Bank which they opened in January 2013 to earn more interest and how to save enough to buy a house in the future.
- 52) The applicant has declared that she works full-time as a housekeeper with the Four Seasons Hotel. She first started working casually in 2011 having initially obtained a part-time role with the hotel. She stated that her salary goes directly into their joint account.
- 53) The applicant has also declared that when she first came to Australia the sponsor was not working full-time as he was caring for his daughter and receiving Centrelink payments. He undertook some work for his mother. It goes on to explain the sponsor's work history since that time. During the period October 2012 until the end of 2016, the sponsor was financially dependent on the applicant although he did some work for his mother and occasional tiling work. He was paid in cash for this work and would buy things for the sponsor and saved the remaining cash at home.
- 54) The couple established a business partnership in March 2018. Through it the sponsor provides general house cleaning and laundry services. The visa applicant helps with some general cleaning and helps with the admin and paperwork.
- 55) The sponsor's Statutory Declaration of 13 March 2020 provides the same information.
- 56) The applicant provided copies of bank statements to the Department and to the previously constituted Tribunal and a consolidated package in respect of the couple's joint Commonwealth Smart Access account in the names of the applicant and sponsor. This package covered the period from November 2012 until October 2018 although the statements were not contiguous. A separate package of the joint account was provided for the period July 2018 to January 2020. The Tribunal was also provided with statements from the couple's Netbank Saver account. Those statements covered the periods from 1 July to 31 July 2013, 1 March to 22 March, 1 April to 29 April, 1 May to 26 August 2014, 8 July 2015 to 7 July and from 1 February 2018 until 30 January 2020.
- 57) The Tribunal was also provided with documentation showing the couple registered the business in March 2018 and copies of statements from their Business Partnership account from when the account was opened in August 2018 until February 2020 and The most recent statement closing date of 21 February 2020 shows a balance of \$3,474.
- 58) Evidence was provided that the couple refer to each other in their respective taxation returns over a number of years since 2013. Mostly recently, the Tribunal was provided with a copy of the visa applicant's 2016, 2018 and 2019 taxation returns which listed the sponsor as her spouse. The sponsor is listed as the applicant's superannuation beneficiary.
- 59) Overall the Tribunal was not satisfied as to the financial aspects of their relationship. The Tribunal accepts that the couple have had joint bank accounts for several years. The statements of the Smart Access account are broadly reflective of the claims made. However, the funds in the couple's Smart Access account which are used to pay for their

portion of the household expenses and their other expenses derive entirely from the visa applicant's salary and this has been the case for many years. There is no evidence that the sponsor contributes financially to the relationship and the declarations provided indicates that he has done so on a very limited basis in the past. Regard has been given to the business cash flow which has been very small since it was established.

- 60) Furthermore, the couple do not own any major assets nor was any evidence provided that they have any significant liabilities. The couple's Netbank Saver account aside from small amounts of interest credited to the account has only had one deposit of \$5,300 from 1 February 2018 until 1 January 2020. The previous period for which a statement was provided was for the period 8 January until 7 July 2016. In that period, the account balance increased by \$911. There is no pattern of regular saving. This record does not demonstrate the claims made they are saving to buy a house.
- 61) When considered together, the Tribunal was not satisfied that the evidence provided supports a finding that the financial aspects of the parties' relationship is consistent with a spousal relationship.

#### 9. Social aspects

- 62) The Tribunal considered the social aspects of the relationship including whether parties represent themselves to other people as being married to each other the opinion of friends and acquaintances about the nature of the relationship and any basis on which the persons plan and undertake joint social activities.
- 63) The applicant provided a Statutory Declaration dated 14 March 2015 in which she states on weekends they go for dinner dates or have dinner with family and friends and that occasionally they take out the sponsor's daughter for the day.
- 64) The applicant provided the Department and the Tribunal with undated and unannotated photographs of the couple some of which include them with other people. The Tribunal accepts that the photographs show the couple have attended events and undertaken some activities together.
- 65) Form 888 (Statutory Declarations) were provided in 2012 and 2015 from the sponsor's mother, a colleague of the sponsor's mother, the sponsor's sister-in-law, the sponsor's step-father who is also the visa applicant's uncle, a co-worker of the visa applicant and a number of friends. The declarants attest to the genuineness of the relationship between the parties. The comments made provide little insight into the relationship although some refer to the couple 'loving and supporting each other', that 'they are happy with each other', that 'they hang out together' and that the couple has a 'strong relationship'.
- 66) A translated copy of a statements of support from the applicant's parents were provided to the Tribunal. They were dated 19 March 2020. They refer to the history of the relationship between the applicant and the sponsor, the sponsor's visit to Vietnam in 2012 during a period when the applicant spent time at home as well the reason why the couple's wedding was held in Australia and why they were unable to attend. The Tribunal has given the statements no weight. They are written in exactly the same terms. The Tribunal finds it unlikely that two people would articulate the same sentiment word for word. They have the appearance of being written by a third person on behalf of the parents.
- 67) The couple's Statutory Declarations of 13 March 2020 state that the couple do not have busy social lives and that they are quite content to stay at home gardening, chatting and cooking. Reference is made to the sponsor's quiet personality and his preference for the

familiar rather than trying new things. The declarations refer to stores where they shop and restaurants they go to. At hearing reference was made to the couple going fishing.

10. *Evidence of witnesses*

68) Oral evidence was provided at hearing from several family and friends.

69) The Tribunal took evidence from Phu Trieu Phong Tran. The witness stated that he is in the choir at the church that the visa applicant attends. He stated they meet when there are significant celebrations at the church and he got to know the sponsor. When asked how much time he spends with the parties as a couple he stated they meet least once a month and they often cooking dinner together.

70) The witness stated that the parties are happy as a couple. He stated that all couples have difficult times, but he sees they care for each other. He stated they know each other's preferences. He stated that the couple is very worried about their situation and sometimes it causes them stress. He stated they are working and concerned for each other. The applicant stated if one comes to visit, they will take food for the other.

71) The Tribunal took evidence from Anna Lam. The witness responded that she knows the couple through the applicant's mother-in-law. She visits their home and got to know the applicant. She stated that she observed that the visa applicant has some intimate mannerisms with the sponsor which show they are a couple. She also sees them at Cabramatta and Bankstown. The witness stated that she was invited to the wedding but was unable to attend as she was overseas at that time but after she returned, she went to visit them at home. She stated that from her observation they care for each other as a couple: they hold hands, they share their food, exchange conversation. She also stated they cook for each other and dye each other's hair. She sees them going out a lot of time. She stated they must have some sort of love for each other. She stated that from her perception as a woman, they are a real couple otherwise, they wouldn't do such things

72) The Tribunal took evidence from Ngoc Duing Nguyen who is the sponsor's mother. She stated that she would like to see the couple continue their relationship for a long time. They are already aged if they don't remain together it would hurt her. The witness stated that she sees their daily activities and she knows they are a couple. The Tribunal asked her what time the visa applicant goes to and returns from work. She stated that she usually leaves at 5.45am and returns at almost 6 pm. The sponsor's departure time depends on his work. If his customers have more work, he will leave home earlier. She stated the visa applicant generally comes home before the sponsor: because of his cleaning job he comes home a bit later. Her wish is for them to have a happy, long life together.

73) The Tribunal also took evidence from the sponsor's sister. She stated that she sees the relationship constantly at home because they live together. When asked to elaborate on aspects that she find convincing, the witness stated that she basically grew up with them. She stated that the couple are always doing activities together and they have a good relationship. She referred to the couple going fishing together, eating and celebrating a lot. She stated they live their private lives. She sees their relationship is happy and easy-going.

74) The Tribunal is prepared to accept that the couple's relatives and friends believe that the couple are in a genuine and committed relationship. However, the fact of them believing this does not necessarily make it so. The Tribunal accepts that the couple undertake activities and attend events together and that they do not have busy social lives as the

sponsor has a quiet personality. However, put together the evidence did not convince the Tribunal as to the social aspects of the relationship

11. Nature of the household

- 75) The Tribunal considered the nature of the household including any joint responsibility for care and support of children; parties' living arrangements; and any sharing of housework.
- 76) The applicant provided a Statutory Declaration dated 14 March 2015 in which she states the couple live with her uncle and his family. Her uncle's wife is also her mother-in-law. She stated that her uncle and mother-in-law rent the property and they share a room. She stated they pay \$100 per week for food and expenses and they pay for water and electricity bills. The applicant declared that her mother-in-law does most of the cooking and cleaning but that she helps with food preparations when she returns from work. The sponsor helps them if needed and she and the sponsor share other household tasks although she did not describe which tasks and how they are shared.
- 77) The Department was provided with copies of utility bills in the couple's joint names for various periods from end of 2014 and up to May 2015 and receipts in joint names were provided for various household items including furniture and electrical appliances. Evidence of mail showing the same address for both parties over a number of years was provided to the Department and the Tribunal. In addition, the Department was provided with a copy of a letter from Centrelink dated 29 July 2015 showing that the visa applicant was listed with Centrelink as a sponsor's correspondence nominee with Centrelink.
- 78) The Tribunal was provided with a copy of a joint tenancy agreement for the period September 2017 to March 2018 for a property rented by the couple and correspondence addressed to the couple from the property manager for dates in 2017, 2018, 2019. Earlier correspondence from April 2015 to February 2017 to is addressed to the applicant and her uncle.
- 79) The couple provided this and the previous constituted Tribunal with receipts in relation to a number of household appliances and some furniture items over various years from 2014 until 2019 which were in joint names and some personal items such as hat and gloves in the name of the visa applicant and a receipt for diamond earrings issued in the name of the sponsor.
- 80) The Tribunal was also provided with a copy of a private health insurance policy summary issued on 9 September 2014 showing the couple rate was being paid but the only insured person covered was the visa applicant.
- 81) Certificates of car insurance issued in March 2016, January 2018 and December 2019 lists both the applicant and the sponsor although the October 2018 document only lists the visa applicant. Home insurance documents for the period from July 2015 until July 2019 refers to both the applicant and the sponsor.
- 82) During the hearing the Tribunal discussed the couple's daily routines with the applicant. She explained that her roster changes weekly. She stated that she usually goes to work earlier than the sponsor. When she is on an early shift, she leaves home at 6.00 am and returns home around between 5.00-6.00 pm. If she comes home at around 5.00 pm she helps her mother-in-law with dinner and then she has a rest or if she is hungry, she eats first.
- 83) The applicant stated that the sponsor leaves home when the customer calls to pick up the laundry. His return home at the end of the day varies. The applicant stated that the

sometimes the sponsor is home when she returns and sometimes, he is not. The Tribunal asked her whether it was because of his work or other interests that he may return later than her, to which she responded that she does not know. She stated he might be working or he might be seeing friends.

- 84) The sponsor stated that he goes to help his brother with tiling or goes to do his own work. The Tribunal asked the sponsor what time the applicant leaves for work. He responded that he is asleep, so he does not know. He stated that it was about 6.00 am or 7.00 am. In relation to when the applicant returns from work, the sponsor stated that it depends on the day. It could 8.00 pm or 9.00 pm or sometimes earlier. If it is earlier, it is between 6.00 pm and 7.00 pm.
- 85) The Tribunal expressed its concerns to the applicant that it appears that the sponsor does not seem to know when she goes to and returns from work. In addition, the applicant did not appear cognisant of the sponsor's movements. It was agreed that the applicant would address this in post-hearing submissions.
- 86) In the applicant's Statutory Declaration of 31 March 2020, she stated that:

12. "[The sponsor] assumed that when he wakes up and I'm gone, and I have just got to work for my morning shifts. He wakes up usually just after 6.00am and 7.00am and so you just assumed that I had just left for work.

13. We do not usually talk about work or about my day as I know he is not interested in my day or my work as a housekeeper. As above, in the past, I used to tell him or start telling him about my day all work and then he will get bored because he is not interested and walk away. Because he shows no interest in my day on my work, I have not been talking to [the sponsor] about these things for a long time as I do not want to bore upset him. As such is not completely sure about my work schedule.

14. The Tribunal member also asked what time I return home on an early day. I said that I returned home about 5pm or 6pm on an early day. My mother it also confirmed that I returned home about 5 pm to 6 pm on an early day. My husband you, [name] said I returned from work at about 6pm or 7pm.

15. On early days, I officially finish work at 4.30pm according to my roster, but the time that I get home varies. Simply, I go home when I finish all my tasks for the day. Sometimes it can be 5pm or 6pm if it's not a busy day or it could be later if it is a busy day and if there is a work needs to be done before I go home. As such I do come home at 6pm or 7pm as well on early days when [name of sponsor] is already at home.

16. I had also told the Tribunal that my husband, [name] sometimes when I returned home at 5pm or 6pm on my early days and sometimes he returns home after I do. The Tribunal Member asked [name of sponsor] if he is "usually home by the time she is home" to which he replied "yes".

17. [Name of sponsor] is usually already by the time I get home early day. However, sometimes when I get home is out and I just assume that he had not returned home at all. The truth is that he has already returned home but gone out to buy groceries, have a chat with friends always stuck in traffic on the way home. As above, [name sponsor] doesn't tell me things like where he

is all he returns home, so sometimes I am not aware he is already home after me”<sup>2</sup>.

- 87) The sponsor also submitted a response in relation to this issue in his Statutory Declaration of 31 March 2020. In large part it reflects the comments made by the applicant. He claimed that the visa applicant does not tell him about her work because she thinks he is not interested and that if was interested he would ask her. He refers to traditional Vietnamese culture and that the main in the relationship asks the questions and the wife usually speaks or tells he husband things only when asked.
- 88) The applicant’s migration representative repeated the submissions made by the applicant and the sponsor in his covering letter. He further states that the inconsistencies in answers from the couple are the result of a lack of communication due to the sponsor’s quiet personality as a result of traditional Vietnamese values. The lack of communication between the couple was also attributed to the applicant’s reluctance to talk to the sponsor about her day and her work in order to keep the harmony in the relationship which is also the result of her traditional Vietnamese values regarding marriage.
- 89) At hearing the Tribunal did not canvass with the parties the extent to which they discuss the applicant’s workday and therefore did not give these explanations any further consideration.
- 90) The discussion at hearing revolved around their daily routines. The sponsor’s evidence was inconsistent with that of the applicant’s. The Tribunal is of the view that the explanation provided in the post hearing submission that the sponsor does not know about the visa applicant’s daily routines because he is not interested in hearing about her workday as a hotel housekeeper does not address the Tribunal’s concern. Nor does it explain why one person in the couple is not aware of the other’s person’s daily routine even though they have been living together since 2012. The Tribunal acknowledges that the visa applicant’s shifts mean that her routines are not always the same and that that the sponsor may be asleep as the applicant is preparing and departs for work. Furthermore, the Tribunal acknowledges that the sponsor’s routine is not consistent depending on his workload. However, it is surprising to the Tribunal that having lived together for an extended period the couple are not aware of each work patterns and daily routines. The Tribunal did not find the explanations reassuring.
- 91) These inconsistencies and the explanations provided raise concerns about the nature of the relationship between the applicant and the sponsor and suggests that they may live in the same household, but they are not living in a genuine and committed spousal relationship.
- 92) There are no children of the relationship although the sponsor has a teenage daughter. At hearing the Tribunal asked the applicant about the sponsor’s daughter. She stated that the girl is turning 14. She did not know what school she attends. The applicant stated that the sponsor’s daughter was sent to her grandparents in Cabramatta to raise her. When asked how much time the sponsor spends with his daughter, the applicant responded now that his daughter is grown up, hardly any time. The Tribunal asked her to provide more detail about what she meant by ‘hardly any time’. She responded that he had seen her two weeks earlier when she came to their home but prior to that it was ‘a long time ago’.
- 93) The sponsor gave evidence that he sees his daughter her every 2 or 3 weeks and referred to her having visited him the previous week.

<sup>2</sup> Applicant’s Statutory Declaration, dated 31 March 2020, paragraphs 29-35.

- 94) The Tribunal explained to the applicant at hearing that the inconsistent responses provided by her and the sponsor regarding the frequency of contact between the sponsor and his daughter is a concern for the Tribunal. It was agreed that the applicant would respond in writing in her post-hearing submission.
- 95) In her Statutory Declaration dated 31 March 2020, the applicant claimed that she was confused at hearing when she was asked how much time the sponsor spends with his daughter. She claimed that she thought the question was how much time his daughter spends visiting them at their home, which is why she said that his daughter hardly visits as she not see her very often with the sponsor. Her Statutory Declaration states "I did understand the Tribunal Member was asking me how much time [name of sponsor] spends with [name of daughter] with or without me and regardless if it's at home or not. I apologise for not understanding the question that the Member was asking of me"<sup>3</sup>.
- 96) The sponsor's Statutory Declaration of the same date essentially repeats the sponsor's comments as does the migration representative's covering letter. He states that the inconsistent answers were the result of an unfortunate misunderstanding by the applicant of the Tribunal's question and a failure of the sponsor to recall how many days since his last visit with his daughter.
- 97) The Tribunal has also had regard to the Statutory Declarations provided by the couple dated 13 March 2020. They are written in very similar terms. In her declaration, the applicant wrote:
18. "We also spend time with [name of sponsor's] daughter, [name of daughter] who is now almost 14 years old. We pick up [name of daughter] and have dinner with us at our home or spend time out together with the [name of sponsor's] mother"<sup>4</sup>.
- 98) Paragraph 67 of the sponsor's declaration of 13 March 2020 makes the same claim.
- 99) With respect to the Tribunal's concern regarding the frequency of contact between the applicant and his daughter, the Tribunal is prepared to accept that the applicant may have misunderstood the question at hearing. However, the Tribunal considers that the inconsistent evidence provided in the written Statutory Declarations of 13 March 2020 and the oral evidence provided at hearing raises credibility concerns regarding the applicant. It is not consistent with her oral evidence at hearing nor the written explanation provided in the post-hearing submissions as outlined in the previous paragraphs. This raises further doubts about the nature of the relationship between the applicant and the sponsor.
- 100) The Tribunal did not raise any concerns regarding the inconsistent answers provided by the couple as to whether the sponsor last saw his daughter the previous week or two weeks earlier. The Tribunal had no issue such minor inconsistencies and accepts they arise from time to time.

### **Post-hearing submissions**

- 101) The inconsistencies in the parties' oral evidence were put to the review applicant at the conclusion of the hearing in accordance with section 359AA of the Act. The Tribunal explained the relevance and consequences of relying on that information and agreed to take post-hearing submissions.

<sup>3</sup>Applicant's Statutory Declaration dated 31 March 2020, paragraphs 38.

<sup>4</sup>Applicant's Statutory Declaration, 13 March 2020, paragraph 53.

102) In addition to the Statutory Declarations provided by the couple, the Tribunal was also provided with several documents on 31 March 2020. The Tribunal took this information into account in making its findings. The migration representative's covering letter outlines the applicant's personal and migration history, outlines the law that must be applied, summarises the applicant's case and the criteria that must be addressed by the Tribunal in its decision. It also repeats the couple's responses in relation to the concerns raised with the couple at hearing. Specific issues raised in those submissions have been addressed in relevant parts of this decision.

103) The Tribunal was also provided with:

- a. a copy of the applicant's birth certificate.
- b. a document on Vietnamese Culture and Society from the Embassy of the Socialist Republic of Vietnam in the United States of America.
- c. a document from Diversicare entitled Vietnamese Cultural Profile, March 2009.

104) In the covering letter provided, it has been submitted that inconsistent responses by the couple during the current and previous Tribunal reviews should be understood in the context of the patriarchal Vietnamese culture and, the sponsor's upbringing, which has shaped his values and personality. It provides background regarding the sponsor's family history and that he was brought up by his maternal grandparents. His grandfather, in particular was very strict and conservative. It also discusses the applicant's background. The letter refers to traditional Vietnamese family values in which the males are the head of family and women are submissive and supported financially by men.

105) The letter submits that these values hindered the sponsor's oral evidence in relation to various aspects of the couple's relationship.

106) The Tribunal considered the information provided and accepts that there are important cultural aspects in respect of the couple's relationship. However, it is not satisfied that these cultural factors explain the inconsistencies in the evidence provided.

### **Non-disclosure certificate**

107) There is a certificate made by a delegate of the Minister under s.375A of the *Migration Act* on the Department's file. That provision permits the Minister to certify that the disclosure of information would be contrary to the public interest for any reason specified in the certificate that could form the basis for a claim by the Crown in right of the Commonwealth in a judicial proceeding that the matter contained in the document, or the information, should not be disclosed. The certificate relates to folios 1-8 on the Department's file CLF2015/73714.

108) The Tribunal is of the view the certificate is not a valid certificate as it does not state how release of the information would be contrary to public interest. The certificate states that it refers to Department of Immigration and Border Protection (DIBP) methodology by way of a request of information from Centrelink. The fact of one Commonwealth agency seeking information from another agency is not of itself of significance in this case. Furthermore, the folios referred to are the request to Centrelink to provide certain information which related to the sponsor's personal particulars, address details, current and past payments. The fact that the then DIPB requested information from Centrelink was not relied on in any way by the Tribunal in making its decision



## OVERALL FINDINGS

- 109) The Tribunal accepts people enter relationships for different reasons and that this does not preclude a relationship being genuine. In this application the concerns regarding the inconsistencies in the evidence have led to the Tribunal being unable to be satisfied that the applicant and sponsor consider the relationship is genuine and that they have a long term commitment to each other.
- 110) The Tribunal acknowledges that a substantial amount of documentary evidence has been submitted in support of the various aspects of the relationship. However, the Tribunal is cognisant that even if a relationship is not genuine written evidence can be obtained. Furthermore, the fact that the parties reside at the same address does not mean they have established a joint household. The fact that they put their names on various documents, bills or receipts does not mean they genuinely share their financial resources. The various organisations that send letters to the applicant and the sponsor at the same address have not undertaken any verification as to whether the couple live together. That evidence merely serves to establish that the couple have provided the same address to those organisations. The fact that people have taken photographs together establishes that they have attended an event together but in itself does not mean they are committed to the relationship and the fact that friends and family are supportive of the relationship, does not of itself that a relationship is genuine. For these reasons, the Tribunal does not consider the documentary evidence to be dispositive of the issues at hand.
- 111) The Tribunal having considered the entirety of the evidence accepts that the applicant and the sponsor are known to each other, that they are part of an extended family and they live in the same household. The Tribunal accepts that they registered their marriage. However, the Tribunal is not satisfied as to the financial aspects of the relationship. Inconsistencies in aspects of the evidence and subsequent explanations raised doubts as to the nature of their commitment to each other and in relation to the nature of their household. The evidence regarding the social aspects was not convincing. Furthermore, the Tribunal had credibility concerns in relation to some aspects of the evidence and claims submitted.
- 112) Therefore, having considered all the evidence, the Tribunal is not satisfied that the parties have a mutual commitment to a shared life to the exclusion of all others, they are in a genuine and continuing relationship. There is nothing before the Tribunal to suggest the parties are related by family.
- 113) For these reasons, the Tribunal affirms the decision under review.

## DECISION

- 114) The Tribunal affirms the decision not to grant the applicant a Partner (Residence) (Class BS) visa.

Linda Holub  
Member